Filed 3/30/05 Binder v. Dept. of Corrections CA4/3

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| BARRY C. BINDER,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>CALIFORNIA DEPARTMENT OF CORPORATIONS,<br><br>Defendant and Respondent. | G033310<br><br>(Super. Ct. No. 03CC06600)<br><br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, Randell L. Wilkinson, Judge. Affirmed.

Turner, Reynolds, Greco & O'Hara, Thomas A. Greco; and Timothy R. Binder for Plaintiff and Appellant.

Jill L. Jablonow and Nicholas Lanza, Senior Corporations Counsel, for Defendant and Respondent.

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Barry Binder appeals from the denial of his petition for a writ of mandate by which he sought relief from the order of the Department of Corporations barring him from employment, management or control of any independent escrow company. The Department's order was based on a civil judgment against Binder finding him liable for breach of his fiduciary duty as a real estate broker. Binder contends that judgment is an inadequate basis for the order. We affirm.

FACTS

Barry Binder is a licensed real estate broker and the responsible managing officer of College Park Realty, Inc. dba ReMax (College Park). In May 2002, Binder applied to the Department of Corporations (the Department) for permission to acquire 33.3 percent ownership of the stock in Suburban Cities Escrow, Inc., an independent escrow company, and a commensurate interest in the company's escrow agent's license. In the course of the application process, Binder revealed he had been found liable for breach of fiduciary duty in a judgment entered after a special verdict in the Orange County Superior Court Case of *Hughes v. Remax College Park Realty, Inc.* (OCSC No. 794601). Based on this judgment, the Department filed an accusation to bar Binder from any employment, management or control of any escrow agent because he had been found liable for an offense "reasonably related to the qualifications, functions, or duties of an escrow agent."

The *Hughes* case arose out of a real estate transaction where College Park agents represented both the sellers and the buyers. A deal was struck and an escrow opened; there was some urgency to close the transaction quickly because the first trust deed was in default and foreclosure was imminent. Before the escrow closed, however, Binder learned that the property was going to be sold at a trustee's sale. Apparently unaware of the pending escrow, Binder tipped off another one of his agents, and the agent contacted a third party, who purchased the property at the trustee's sale. The buyers sued

College Park, Binder, and his agents. The jury found Binder, along with the other defendants, was liable to the buyers for negligence and breach of fiduciary duty. It found all the defendants except Binder had concealed or suppressed a material fact; it found none of the defendants had acted with fraud or malice.

After an administrative hearing, the administrative law judge found the *Hughes* jury determined that Binder "had been negligent and had breached his fiduciary duty to the plaintiffs in connection with the allegations contained in the Complaint." The judge found Binder was the "Responsible Managing Officer of Remax College Park Realty, Inc." and was "responsible for overseeing [its] agents," but "he was not directly involved with the subject transaction . . . ." The judge reasoned that a fiduciary duty is the "highest standard of duty implied by law," and a breach of that duty in one context would be related to a breach of a fiduciary duty in another context, even if the duties were defined differently. "The breach of that standard is as serious in the escrow business as it is in the real estate business." Accordingly, the judge concluded that because an escrow agent owes a fiduciary duty to each of the parties to an escrow, the breach of a fiduciary duty as a real estate broker was reasonably related to the qualifications, functions or duties of an escrow agent.

Binder filed a petition for writ of mandate in the superior court pursuant to Code of Civil Procedure section 1094.5, seeking an order directing the Department to set aside its decision to bar him from obtaining a license as an escrow agent. The superior court upheld the order, stating, "One who has been found liable for a breach of fiduciary duty can also very persuasively be said to have demonstrated an inability to carry out duties regarding real estate transactions."

## DISCUSSION

The Department filed the accusation against Binder under the authority of Financial Code section 17423, subdivision (a)(2).[1] That section allows the Department to "bar from any position of employment, management, or control any escrow agent, or any other person, if the commissioner finds . . . [¶] . . . [¶] [t]hat the person has been convicted of or pleaded nolo contendere to any crime, or has been held liable in any civil action by final judgment, or any administrative judgment by any public agency, if that crime or civil or administrative judgment involved any offense specified in subdivision (b) of Section 17414.1, or any other offense reasonably related to the qualifications, functions, or duties of a person engaged in the business in accordance with the provisions of this division."

Binder contends his unintentional breach of fiduciary duty as a real estate broker does not constitute an "offense" that is "reasonably related" to the duties of an escrow officer. He first claims it is clear that the Legislature intended to punish only willful, criminal behavior, as evidenced by the list of offenses in section 17414.1, subdivision (b); he insists this list includes only criminal convictions "or their equivalent," or similar acts of serious malfeasance or misconduct, all of which involve intentional behavior. But the listed offenses involve criminal, civil, and administrative wrongs and do not all require intentional behavior.

Section 17414.1, subdivision (b) includes violations of the Banking Law (§ 3350 et seq.), the Savings Association Law (§ 5300 et seq.), the Credit Union Law (§ 14750 et seq.), the Escrow Law (§ 17400 et seq.), the Industrial Loan Companies Law (§ 18435 et seq.), and the federal Financial Institutions Reform, Recovery and Enforcement Act of 1989 (Public Law 101-73). Some of these offenses are designated as felonies or misdemeanors, and some are punishable by fines. Some can be based on

[1] All further statutory references are to the Financial Code, unless otherwise specified.

negligent behavior. (See, e.g., § 18440 [industrial lender shall not take a power of attorney at the time of the loan other than for specified circumstances]; § 14765 [officer, director, or employee of a credit union shall not be "interested" in the purchase of credit union's assets for less than market value].) The list also includes "[o]ffenses involving robbery, burglary, theft, embezzlement, fraud, fraudulent conversion or misappropriation of property, forgery, bookmaking, receiving stolen property, counterfeiting, controlled substances, extortion, checks, credit cards, or computer violations specified in Section 502 of the Penal Code." (§ 17414.1, subd. (b)(7).)

In any event, discipline under section 17423 is not limited to those offenses listed in section 17414.1, subdivision (b). In addition to those offenses, discipline may be based on "any other offense reasonably related to" an escrow agent's responsibilities. Binder, of course, concedes this point but argues that "any other offense" must involve the same type of behavior, not mere negligence. He urges us to compare the bases for discipline of a real estate licensee found in Business and Professions Code section 10177.5: "When a final judgment is obtained in a civil action against any real estate licensee upon grounds of *fraud*, *misrepresentation*, or *deceit* with reference to any transaction for which a license is required under this division, the commissioner may . . . suspend or revoke the license of such real estate licensee." (Italics added.)

The comparison does not enhance Binder's argument. Business and Professions Code section 10177.5 clearly requires a showing of fraud, misrepresentation or deceit before discipline can be imposed under that section, demonstrating that the Legislature is capable of specifying the necessity of willful conduct when necessary. Section 17423, on the other hand, has no such specific language. It merely requires that discipline be based on an offense reasonably related to the responsibilities of an escrow agent. There is no language suggesting the limitations on the offense urged by Binder.

Binder also points to section 17423.1, enacted in 2001, which requires the Department to notify the Department of Real Estate and the Department of Insurance when it imposes discipline under section 17423. In the chaptered legislation that enacted the statute, the Legislature declared, "The escrow industry in California is regulated by several different governmental agencies . . . . [¶] It is of particular importance for the various regulators to cooperate when one regulator is taking action against a person for *serious malfeasance or misconduct* that is resulting in a suspension, restriction, revocation or other prohibition on the person's privilege to work in the escrow industry." (Historical and Statutory Notes, 30B West's Ann. Fin. Code (2005 supp.) foll. § 17423.1, p. 87, italics added.) Binder urges the italicized language demonstrates the Legislature could not have intended that discipline be imposed for mere negligence.

We are unaware of any authority for the proposition that negligence cannot constitute serious misconduct. The language of the statute is broad enough to include Binder's liability for breach of fiduciary duty within the term "any other offense."

Binder next argues even if his liability for breach of fiduciary duty as a real estate broker is an "offense" under section 17423, it is not "reasonably related" to the responsibilities of an escrow agent. He contends an escrow agent only has the duty to follow the escrow instructions (*Romo v. Stewart Title of California* (1995) 35 Cal.App.4th 1609, 1618, fn. 9), whereas a broker has the duty "to know those important matters that will affect the principal's decision, and he has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision." (*Field v. Century 21 Klowden-Forness Realty* (1998) 63 Cal.App.4th 18, 25.) Thus, he argues the breach of a broker's broad duty is not related to the breach of an escrow agent's limited one.

The parties agree that the trial court was required to exercise an independent review of the administrative hearing because the decision affected a fundamental vested right. (*Mann v. Department of Motor Vehicles* (1999) 76

Cal.App.4th 312, 320.) Thus, the trial court was required to review the administrative record and reweigh the evidence presented to determine whether the administrative findings were supported by the weight of the evidence. (Code Civ. Proc., § 1094.5, subd. (c).) But while reweighing the evidence, "a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.) On review, we must affirm the trial court's findings if they are supported by substantial evidence. (*Governing Board v. Haar* (1994) 28 Cal.App.4th 369, 378.)[2]

Binder did not request a statement of decision from the trial court. (See *Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44, 67.) Therefore, although it did not say so, we presume the trial court reweighed the evidence that was presented to the administrative law judge. (See *Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 Cal.App.4th 1305, 1313.)

The only evidence in the record consisted of the facts of the transaction underlying the *Hughes* case, which showed that Binder breached his fiduciary duty to his clients. However, as the administrative law judge pointed out, "[Binder] failed to offer any evidence of mitigation or rehabilitation, or any other evidence that might serve to militate against an outright bar from employment, management and control of any escrow agent. In fact, so little was offered with respect to the facts and circumstances that resulted in the civil judgment against [Binder], the trier of fact is left without knowing whether the jury rendered its verdict <u>despite</u> [his] lack of involvement in the subject

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[2] Binder argues we should apply de novo review because the trial court was dealing with undisputed facts and deciding a "pure question of law." (*Anserv Insurance Services, Inc. v. Kelso* (2002) 83 Cal.App.4th 197, 204.) While the facts are undisputed, it seems the ALJ's decision was more like a judgment call that could go either way on these particular facts. A deferential standard of review seems appropriate here.

transaction or because of his lack of involvement in it. Absent any such evidence, a complete bar is the only feasible result." The administrative law judge further remarked, "Even if [Binder] could show that certain fiduciary duties breached by a real estate broker should not be considered for purposes of Financial Code section 17423, he would have to establish (1) which one(s) should not be so considered, (2) why they should not be so considered, and (3) that the fiduciary duty [he] was found to have breached in the civil action qualifies as one that should not be considered. No evidence was offered to establish any of those three criteria."

After reviewing the scant evidence, the trial court concluded that Binder's breach of fiduciary duty in the *Hughes* case was reasonably related to the responsibilities of an escrow agent. We conclude there is substantial evidence in the record to support that conclusion.

Binder's remaining arguments are without merit. He contends the Department engaged in an act of a legislative nature by creating a rule that interprets section 17423 as applying to a civil judgment for breach of fiduciary duty; thus, he attempts to characterize the Department's decision as an underground regulation that was formulated without the hearing and public comment procedures of the Administrative Procedure Act (Gov. Code, § 11340 et seq.). This act applies only to rules intended to apply generally to a class of people. (Gov. Code, §§ 11340.5, 11342.600; *Department of Veterans Affairs* (1980) 110 Cal.App.3d 622, 630.) There is no indication in the record that the Department was formulating a rule for general application. Rather, it was interpreting section 17423 as it applied to the facts of this case.

Binder argues he is exempt from the entire Escrow Law under section 17006, subdivision (a)(4): "This division does not apply to . . . [a]ny broker licensed by the Real Estate Commissioner while performing acts in the course of or incidental to a real estate transaction in which the broker is an agent or a party to the transaction and in

which the broker is performing an act for which a real estate license is required." This exemption is for a real estate broker who conducts an escrow incident to a sale handled through his office. (43 Ops.Atty.Gen. 284, 6-10-64; *Escrow Institute of Cal. v. Pierno* (1972) 24 Cal.App.3d 361, 366.) Binder concedes his application was for the ownership of an independent escrow company, i.e., one that conducts escrows for the general public.

DISPOSITION

The judgment is affirmed.

SILLS, P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.